IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

MAE B. BURGESS, Co-Administratrix, FRED FANCHER and ADRIAN J. GUM, Co-Administrators, of the Estate of T. A. BURGESS, Deceased,
Petitioners,

vs.

RELIANCE LIFE INSURANCE COMPANY, a Corporation,
Respondent.

No. 462.

MOTION FOR REHEARING.

RUBEY M. HULEN,
BOYLE G. CLARK,
JAMES E. BOGGS,
PAUL M. PETERSON,
WILLIAM H. BECKER,
HOWARD B. LANG, JR.,
W. L. NELSON, JR.,
All of Columbia, Missouri,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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MOTION FOR REHEARING.

Come now the petitioners Mae B. Burgess, coadministratrix, Fred Fancher and Adrian J. Gum, coadministrators of the estate of T. A. Burgess, deceased, and move the Court to rehear the petition for certiorari heretofore filed herein and denied on November 12, 1940, by order of this Court. The said petition for certiorari requested review of the opinion and judgment of the Circuit Court of Appeals for the Eighth Circuit in the cause of *Reliance Life Insurance Company v. Burgess*, 112 Fed. (2d) 234.

The rehearing is requested for the following reasons:

1. The petitioners feel that the original petition for certiorari filed herein did not clearly present the question of

the misconstruction of Rule 50, Federal Rules of Civil Procedure, by the Eighth Circuit Court of Appeals in this and other cases. In the case at bar and in the cases of *Massachusetts Protective Association v. Mouber* (C. C. A. 8th), 110 Fed. (2d) 203, and *Lowden v. Denton* (C. C. A. 8th), 110 Fed. (2d) 274, the Eighth Circuit Court of Appeals has adopted a peculiar construction of Rule 50 *construing Rule 50 to prevent remand for a new trial where motion for directed verdict is made, even though it is evident that the deficiency of proof found on appeal may be supplied on a retrial.*

On motion for rehearing in the Circuit Court of Appeals, the petitioners supplied affidavit of an alienist of a formal opinion of insanity to be offered on retrial (R. 414, 378). Until the opinion of the Court of Appeals, petitioners believed insanity submissible on the facts without a formal opinion thereof.

2. In the oral argument of the cause of *Montgomery Ward and Company, Inc., v. Duncan*, had on November 12, 1940, it was developed that the Eighth Circuit Court of Appeals had been consistently giving a peculiar construction to Rule 50. The opinion in *Reliance Life Insurance Company v. Burgess* was cited by counsel in that case as the latest of this series of unusual rulings under Rule 50. The importance of the case was emphasized by the continued reference thereto and discussion thereof by this Court and counsel in oral argument of the *Montgomery Ward and Company* case. In view of the argument in that case, the petitioners feel that the importance of this matter is made to appear more clearly.

3. The ruling of the Eighth Circuit Court of Appeals in the case at bar, the *Reliance* case, is in conflict with (a) Rule 50 itself, (b) the practice obtaining prior to the adoption of Rule 50.

Conclusion.

For the reasons set forth herein, the petitioners respectfully submit that the order in this cause denying the petition for review should be set aside and a rehearing granted.

Respectfully submitted,

RUBEY M. HULEN,
BOYLE G. CLARK,
JAMES E. BOGGS,
PAUL M. PETERSON,
WILLIAM H. BECKER,
HOWARD B. LANG, JR.,
W. L. NELSON, JR.,
All of Columbia, Missouri,
Attorneys for Petitioners.

Certificate of Counsel.

I, William H. Becker, counsel for the petitioners herein, certify that this motion was presented in good faith and not for delay.

William H. Becker.

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING.

The interpretations given Rule 50 by the Circuit Court of Appeals for the Eighth Circuit in this and other cases is a matter of general importance and concern. The Circuit Court of Appeals for the Eighth Circuit has construed Rule 50 to deprive it of the power, enjoyed before the Rules of Civil Procedure were adopted, to remand causes for a new trial where the evidence has not been fully developed, and it is evident that this deficiency in proof found by the appellate court can be supplied on a retrial.

In the case at bar the District Court submitted to the jury the question of insanity upon evidence of peculiar conduct on the part of the insured. Both counsel for the petitioners and the District Court acted under the impression that insanity could be submitted upon proof of conduct inconsistent with sanity without the formal opinion of an expert. The Circuit Court of Appeals held that a formal opinion was necessary, but refused to remand the case for a new trial to permit the claimants to fully develop their case by offering a formal opinion of insanity. The affidavit of an outstanding psychiatrist was attached to the motion for rehearing (R. 414) and to the motion to remand for a new trial (R. 378). It was therefore evident that the deficiency in proof found would be supplied. But the Circuit Court of Appeals for the Eighth Circuit erroneously held that, under Rule 50b, it had no discretion, but *must* direct the entry of judgment on the merits without a retrial. This ruling was based upon two prior decisions of the same Court. *Massachusetts Protective Association v. Mouber* (C. C. A. 8th), 110 Fed. (2d) 203, and *Lowden v. Denton* (C. C. A. 8th), 110 Fed. (2d) 274. All three of these cases construe Rule 50 to give the moving party under Rule 50b the right to have the case reversed without a new trial. (See in particular *Lowden v. Denton*, supra.)

Rule 50b, by its express terms, gives the Court the power to enter judgment on the motion or to grant a new trial where a verdict is returned by the jury. In this respect it provides as follows:

> "If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

It has long been the practice to remand cases for a new trial for further production of proof where the record is deficient in a material matter which may be supplied. *Roberts v. Lewis,* 144 U. S. 653, 36 L. Ed. 579; *United States v. Rio Grande Dam and Irrigation Company et al.,* 184 U. S. 416, 46 L. Ed. 619.

It is authorized when the justice of the case requires it to direct a new trial. 3 Am. Jur., Appeal and Error, § 1218, pp. 7-9, and cases cited in Note 8.

There is no indication in the notes of the Advisory Committee that there was any intention to deprive a reviewing court of this power.

Respectfully submitted,

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